

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ determined claimant suffered an accidental injury arising out of and in the course of claimant's employment on June 29, 2000. The ALJ further adopted the causation opinions of Dr. Michael Zafuta and Dr. Edward Prostic and the impairment of function opinion of Dr. Philip Mills, the court ordered independent medical examiner, and awarded claimant a 7 percent permanent partial general disability.

Respondent and its insurance carrier requested Board review and argues claimant did not suffer an accidental injury to her back that arose out of and in the course of her employment. Respondent and its insurance carrier argue that the claimant neither injured her back in the June 29, 2000 accident at work nor was it a natural consequence of the work-related knee injury. Respondent and its insurance carrier further contend that claimant's impairment of function to the knee is zero percent based upon the opinion of Dr. Kenneth Jansson.

Claimant argues the ALJ's finding of a general body disability should be affirmed but that the functional impairment should be increased to 19 percent based on the rating by Dr. Prostic.

Accordingly, the issues raised on review are whether the claimant's back injury arose out of and in the course of her employment and the nature and extent of claimant's disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's decision should be affirmed.

To receive workers compensation benefits, the claimant must show a "personal injury by accident arising out of and in the course of employment."¹ The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.² Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to each case.³

¹ K.S.A. 44-501(a); *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197, 689 P.2d 837 (1984).

² *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 805, 909 P.2d 657 (1995).

³ *Newman v. Bennett*, 212 Kan. 562, 568, 512 P.2d 497 (1973).

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁴ An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁵ The test is not whether the accident causes the condition, but whether the accident aggravates, accelerates or intensifies the condition.⁶ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.⁷

Claimant suffered a work-related accident to her right knee on June 29, 2000. The Board concludes that claimant has met her burden of proof to establish that thereafter, and as a direct and natural consequence of that knee injury, claimant also suffered a compensable injury to her low back.

The claimant limited her request for compensation to her functional impairment. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed. rev.). At the time of claimant's injury, the Act required that functional impairment be based on the *Guides*.⁸ The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁹

The Board agrees with the ALJ that, in this instance, the opinions of claimant's expert Dr. Prostic and the primary treating surgeon Dr. Zafuta are the more credible opinions on the causation of the back injury and the functional impairment opinion of the

⁴ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁵ *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

⁶ *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

⁷ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973); See also *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263, rev. denied 261 Kan. 1084 (1996).

⁸ K.S.A. 44-510e(a).

⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

court ordered independent medical examiner, Dr. Mills, is the more persuasive. Accordingly, the Board adopts and affirms the ALJ's determination claimant has suffered a 7 percent permanent partial functional impairment to the body as a whole.

Award

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge dated June 24, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Kurt W. Ratzlaff, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Workers Compensation Division